NO. 56077-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SIDNEY HICKLIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Clallam County Superior Court No. 20-1-00218-05

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. RCW 9A.44.020(2) prohibits the admission of a victim's past sexual history on the issue of the victim's credibility. The statute also prohibits the admission of such evidence to prove a victim's consent except pursuant to the procedures set forth in RCW 9A.44.020(3). The statute and nearly identical statutes nationwide were enacted to reverse course on an antiquated common law practice that negatively impacted the fairness of the trial process. This practice allowed a victim's past sexual history, largely irrelevant to guilt or innocence, to be paraded before the public having the effect of discouraging victims from coming forward, shaming them when they do, fostering perjury, and creating unfair prejudice leading to frequent acquittals.

   In order to mitigate those negative effects on the fairness of the trial process and facilitate justice, legislature enacted RCW 9A.44.020(3)(c) creating a new

hearing for the sole purpose of determining the relevance and admissibility of a victim's past sexual history. RCW 9A.44.020(3)(c) requires that the hearing be held outside the presence of the jury and closed to all "except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court."

The question in this case is whether the public trial right does not attach to rape shield hearings under the experience and logic test adopted in *State v. Sublett*[1] when such hearings have not been traditionally open to the public and where public access would have a negative role in the process in question?

2. Whether the convictions for second degree assault, felony harassment, and unlawful imprisonment do not

[1] 176 Wn.2d 58, 73, 292 P.3d 715 (2012)

violate double jeopardy because they are not the same offense in law or fact?

3. Whether second degree assault and felony harassment and felony harassment do not merge with second degree rape when the statute for second degree rape does not require proof of those crimes?
4. Whether the community custody condition prohibiting Hicklin from "entering drug areas as defined by the court and CCO" should be stricken as unconstitutionally vague as it does not provide sufficient guidance of what constitutes a "drug area" and is subject to arbitrary enforcement?
5. Should the requirement to pay supervision fees as determined by the Dept. of Corrections be stricken when the court only intended to impose mandatory legal financial obligations?

II. STATEMENT OF THE CASE

The State charged Hicklin with the crimes of Rape in the

Second Degree by forcible compulsion, Assault in the Second Degree by strangulation, Felony Harassment, and Unlawful Imprisonment. CP 95.

Prior to trial, Hicklin testified at a rape shield hearing to determine the admissibility of his prior sexual relationship with Hawthorne. RP 37. The trial court closed the hearing to the public including Hicklin's sister. RP 36–37. The State pointed out that testimony was not necessarily required as the defense counsel filed an affidavit for Hicklin's offer of proof and a credibility determination was not needed. RP 37; CP 91. Hicklin was called to testify regarding his offer of proof. RP 38–42.

Hicklin testified that he met Ms. Hawthorne in 2017 in self-help meetings. RP 39. They became friends and eventually their friendship evolved to be sexual in nature. RP 36. Over the course of the next few years, Hicklin and Hawthorne continued a sexual relationship and they had sex in a hot tub at Hicklin's mother's house about three years prior. RP 40.

The State declined to cross examine Hicklin since it was an offer of proof and the State pointed out that it was just for the court to determine the relevancy of Hicklin's proffered testimony. RP 38, 43–44.

The court then engaged the parties in discussions on whether Hicklin's claim about his past sexual relationship with Hawthorne would be admissible. RP 44–51. The State pointed out that Hawthorne was claiming that she and Hicklin did not have a sexual relationship. RP 44. The State also argued that the testimony was not relevant to the issue of consent because Hicklin was not claiming that Hawthorne consented, rather Hicklin claimed that sexual intercourse simply didn't happen. RP 46. The court agreed. RP 46, 47–48, 51. The defense expressed frustration, "You just can't say well what, he asked her come over, take a hot tub and then that's all they get to have come in about her?" RP 50. After the hearing, the court was reopened to the public. RP 52.

At trial, Hawthorne testified she met Hicklin in the

recovery community about three years prior. RP 277. She described her relationship with Hicklin as a friendship based on recovery. RP 278. On July 4, 2020, Hawthorne and her boyfriend Ashley Messersmith (Ash) were on the beach and Ash wanted to go to a barbeque but Hawthorne didn't feel like being around crowds. RP 278–79, 81.

Later on, Hawthorne and Hicklin communicated by Facebook messenger and she agreed to go visit Hicklin after having a couple shots of vodka. RP 279, 283, 285. Ash had gone to the barbeque and Hawthorne was upset and planned to talk and hang out with Hicklin. RP 284. When she arrived, Hicklin was drinking Mike's Hard Lemonade. RP 285. They sat on the couch and talked for a bit and then Hicklin asked her to get him more hard lemonade. RP 285. Hawthorne went to the local AM/PM to get the hard lemonade and paid for it with Hicklin's bank card which he gave to her for this purpose. RP 287, 290.

When Hawthorne came back, she gave Hicklin the bag with the hard lemonade but the bank card was not in the bag

where she thought she put it with the receipt. RP 292. Hicklin started getting agitated and angry over the bank card. RP 293. Hicklin began pacing and yelling while Hawthorne was sitting on the couch. RP 293.

Hawthorne testified that everything happened fast after that and she didn't really have a chance to go look for the bank card. RP 294. As she began to look for the card, Hicklin was already by her and he put his hand around her neck. RP 294. Hicklin asked for his card again and was squeezing her neck to hold her down. RP 295. Hawthorne stated "At that time, it wasn't a real hard squeeze." RP 295. "It was more of a just holding me down squeeze." RP 295. Hawthorne also stated that because of the way she was positioned on the couch and his body position she was "stuck." RP 295. Hawthorne also pointed out that she only weighs 90 or 92 lbs (RP 296) and that Hicklin was a very big man. RP 303.

The situation escalated fast and Hawthorne felt shock. RP 296–97. Hicklin began to squeeze harder and Hawthorne felt that

if she didn't come up with an answer about the card the squeezing would get harder. RP 299. Hawthorne found it difficult to talk and breathe while Hicklin was squeezing her throat. RP 299. Hawthorne testified regarding the difficulty speaking stating, "Yeah, but it never got to the point where I didn't have a voice. It was never..." RP 299. Hawthorne could feel the weight of Hicklin's body on the inside of her leg. RP 299. While squeezing Hawthorne's neck, Hicklin opened her legs and threated to kill her, claiming "I'll kill you, I will end you." RP 300. Then Hicklin inserted himself in Hawthorne. RP 301. Hawthorne testified that she tried to resist a little bit in a way to show Hicklin it was not okay but *that Hicklin was a very big man and that fighting back was futile*. RP 302–03. The prosecution inquired more about whether she fought back:

> Q You made a distinction just a moment ago between the type of pressure to let him know stop and the type of, you know, pushing to fight. Can you tell the jury why you didn't start physically fighting?
>
> A There was no way I'd win, there was -- he would've hurt me more. I mean, it's just...

> Q Okay and why do you say there was no way you would win?
>
> A Because he's a very big man and the position, *it was the position alone was enough* and it just there was no way.

RP 303 (emphasis added).

After it stopped, Hawthorne stated that she had money in her car which wasn't true and asked to go to her car. RP 303. Hawthorne didn't think that Hicklin ejaculated. RP 304. When she got to her car she immediately called her boyfriend Ash who came over to Hawthorne quickly from a barbeque. RP 278–79, 306. Ash called the police. RP 306.

Hicklin testified that on July 4, he saw Hawthorne at a rest stop or on the ferry and asked if she wanted to hang out on the 4th. RP 648. Hawthorne said that sounded good. RP 648. When Hicklin got to his mother's house, he contacted Hawthorne to invite her over for a hot tub. RP 649. Hawthorne showed up with vodka and was drinking a lot and Hicklin testified he had a beer and later that it was a Mike's Hard Lemonade. RP 650–51. About

15 to 20 minutes after Hawthorne showed up, Hicklin asked Hawthorne if she would go get some more Mike's Hard Lemonade for him after he finished. RP 650–51. He asked Hawthorne to get 3 or 4 cans. RP 651. Hicklin gave her his bank card to pay for it. RP 651. Hicklin testified that Hawthorne never came back and that he texted her and called her and told her that he would call the cops if she didn't give him his bank card back. RP 653. Then Hicklin got a call from Hawthorne's boyfriend Ash who talked about getting his keys back and how he had Hicklin's card. RP 654.

Hicklin testified that he did not get physical with anyone that night and did not rape Hawthorne. RP 650.

The jury found Hicklin guilty of Rape in the Second Degree, Assault in the Second Degree, Harassment–Threats to Kill, and Unlawful Imprisonment. CP 9. The trial court sentenced Hicklin to 136 months confinement for Rape in the Second Degree, 15 months for Assault in the Second Degree, 12 months for Harassment–Threats to Kill, and 2 months for Unlawful

Imprisonment. CP 13–14. All counts were ordered to be served concurrently. CP 13.

The trial court also ordered the community custody condition to not enter drug areas as defined by the court or CCO. CP 25.

Finally, the court found Hicklin to be indigent (CP 12) and ordered only mandatory legal financial obligations. RP 813. The court did not strike boiler plate from the judgement and sentence requiring Hicklin to "(7) pay supervision fees as determined by DOC." CP 14.

III. ARGUMENT

A. RAPE SHIELD HEARINGS TO DETERMINE THE RELEVANCE OF A VICTIM'S PAST SEXUAL HISTORY DO NOT IMPLICATE PUBLIC TRIAL RIGHTS BECAUSE THEY HAVE NEVER BEEN OPEN TO THE PUBLIC AND PUBLIC ACCESS WOULD NOT HAVE A POSITIVE ROLE IN THE FUNCTIONING OF THE HEARING.

A defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (citing *Washington v. Texas*,

388 U.S. 14, 16, 87 S.Ct. 1920, 1921–22, 18 L.Ed.2d 1019 (1967) and E. Cleary, McCormick on Evidence § 185 (2d ed. 1972 & Supp.1978)).

Evidence of a victim's past sexual history has been determined to be largely irrelevant. *State v. Geer*, 13 Wn. App. 71, 73, 533 P.2d 389 (1975) (citations omitted) ("There is ample authority in Washington to support the proposition that specific acts of sexual misconduct on the part of the prosecutrix are inadmissible in rape cases as such evidence bears on neither the question of consent or credibility.").

Such evidence is often so highly prejudicial to the truth finding process that the State has a compelling interest in having such evidence excluded in order to avoid acquittals based upon irrelevant evidence. *See Hudlow*, 99 Wn.2d at 16; *State v. Morley*, 46 Wn. App. 156, 158–59, 730 P.2d 687 (1986) ("The prejudice focused on is to the factfinding process itself, i.e., whether the introduction of evidence of the victim's past sexual

history may confuse the issues, mislead the jury, or cause the case to be decided on an improper or emotional basis.").

However, evidence of a victim's past sexual history may be relevant to a defense of consent. Therefore, legislature set forth procedures to protect a defendant's rights to present a defense and the truth seeking function of the trial. *See Morley*, 46 Wn. App. at 158–59) (citing *Hudlow*, 99 Wn.2d 1 (construing "the predecessor of our current rape shield statute, former RCW 9.79.150(3), now recodified as RCW 9A.44.020(3).")).

Under RCW 9A.44.020(2), evidence of a victims past sexual history is inadmissible on the issue of consent except through the procedure set forth in RCW 9A.44.020(3):

> . . .
>
> (a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

> (b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
>
> (c) If the court finds that the offer of proof is sufficient, *the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.*

RCW 9A.44.020(3).

Here, Hicklin argues that the closed nature of the rape shield hearing under RCW 9A.44.020(3)(c) violates his constitutional right to a public trial.

"The right to an open public trial is guaranteed by article I, sections 10 and 22 of the Washington State Constitution." *State v. Jones*, 185 Wn.2d 412, 421, 372 P.3d 755 (2016).

When examining an alleged violation of the public trial right, courts must first determine whether the particular proceeding at issue implicates the public trial right. *State v. Magnano*, 181 Wn. App. 689, 694, 326 P.3d 845 (2014) (citing

State v. McCarthy, 178 Wn. App. 90, 95, 312 P.3d 1027 (2013) (citing *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012))).

The question of whether a public trial right attaches to a particular proceeding may not be answered based merely on the label of the proceeding. *State v. Sublett*, 176 Wn.2d 58, 72–73, 292 P.3d 715 (2012).

The Washington State Supreme Court in *State v. Sublett* adopted the experience and logic test from the U.S. Supreme Court decision in *Press–Enterprise Co. v. Superior Court* for the purpose of determining whether the public trial right attaches to a particular proceeding. *Sublett*, 176 Wn.2d at 73 (citing *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). "The experience and logic test can be helpful in that it allows the determining court to consider the actual proceeding at issue for what it is, without having to force every situation into predefined factors." *Sublett*, 176 Wn.2d at 73.

"The first part of the test, the experience prong, asks 'whether the place and process have historically been open to the press and general public.'" *Sublett*, 176 Wn.2d at 73 (quoting *Press–Enterprise Co.*, 478 U.S. at 8). "The logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.*

The public trial right only attaches to a particular proceeding if both prongs of the experience and logic test have been affirmatively established. *Id.*

The defendant has the burden to satisfy the experience and logic test. *Id.* at 75; *see also In re Pers. Restraint of Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013) ("It is [the defendant's] burden to satisfy the experience and logic test, ...").

1. A rape shield hearing under RCW 9A.44.020(3)(c) does not implicate public trial rights under the experience test because such hearings have not been traditionally open to the public or the press.

"The first part of the test, the experience prong, asks 'whether the place and process have historically been open to the

press and general public.'" *Sublett*, 176 Wn.2d at 73 (quoting *Press–Enterprise Co.*, 478 U.S. at 8).

The rape shield statute was initially codified as RCW 9.79.150 and was recodified as RCW 9A.44.150 in 1979. *State v. Wilmoth*, 31 Wn. App. 820, 822 n.1, 644 P.2d 1211 (1982). The requirement of RCW 9A.44.150(3)(c) existed in its prior codification as RCW 9.79.150(3)(c). *See Hudlow*, 99 Wn.2d at 7 ("(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed ....").

Thus, rape shield hearings to determine whether the defendant's evidence is relevant and admissible on the issue of consent have not been not been open to the public since the statute was enacted.

"The rape shield statute was created for the purpose of ending an antiquated common law rule that 'a woman's promiscuity somehow had an effect on her character and ability

to relate the truth.'" *State v. Jones*, 168 Wn.2d 713, 723, 230 P.3d 576 (2010) (quoting *Hudlow*, 99 Wn.2d at 8).

In 1983, the Washington State Supreme Court noted in *State v. Hudlow* that "[t]he presumption of inadmissibility of prior sexual conduct evidence on the issue of consent is a recent trend, reversing years of the opposite rule, and is based on the observation that such evidence is usually of little or no probative value in predicting the victim's consent to sexual conduct on the occasion in question." *Hudlow*, 99 Wn.2d at 9, n.1 ("As of 1980, 45 states and the federal courts had adopted rape shield statutes of some kind." (citation omitted)).

Thus RCW 9.79.150(3)(c) recodified as RCW 9A.44.020(3)(c) created a new hearing in and of itself in an effort to protect the victim from public disclosure of irrelevant, unfairly prejudicial, and damaging "evidence" and to keep it out the trial. This means that the rape shield hearing since its creation has never been open to the public.

Virtually all other States have similar statutes that also require the hearing to be closed to the public by excluding all but the necessary parties or through an in camera hearing. *See Com. v. Jones*, 472 Mass. 707, 722, 37 N.E.3d 589 (2015) ("Under either definition, therefore, an "in camera hearing" denotes one from which the public is excluded."); *see also People v. Weiss*, 133 P.3d 1180, 1185 n.4 (Colo., 2006) (citation omitted) (Forty-nine states and the United States Congress have enacted rape shield laws that generally bar admission of evidence of a rape complainant's sexual conduct and set up the rape shield protective mechanism."); *State v. Johnson*, 123 N.M. 640, 647, 944 P.2d 869 (1997) (citing the Minnesota Court of Appeals in *State v. Crims*, 540 N.W.2d 860, 867 (Minn.Ct.App.1995)).

The rape shield hearing specifically created under RCW 9A.44.020 and other statutes nationwide have never been traditionally open to the public and the press. Therefore, Hicklin fails to establish the experience prong of the test.

2. A rape shield hearing under RCW 9A.44.020 does not implicate public trial rights under the logic prong of test because public access would not have a positive role on the hearing and would reintroduce the negative impact on the fairness of the trial.

"The logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Sublett*, 176 Wn.2d at 73 (quoting *Press–Enterprise Co.*, 478 U.S. at 8). "[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *Id.* at 72 (citing *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

The rape shield statute was created because public access to a victims largely irrelevant past sexual history had a *negative* impact on the trial process. *See State v. Kalamarski*, 27 Wn. App. 787, 791 n.2, 620 P.2d 1017 (1980) (J. McInturef dissenting) (emphasis added):

As a part of the legislative history behind RCW 9.79.150 (RCW 9A.44.020) we note a memorandum dated March 7, 1975, from the Chairman of the State Senate Judiciary Committee to members of the Senate Rules Committee in which it is stated:

This proposal is badly needed, and is long overdue. There is no logical or scientific relationship between chastity and veracity. No psychologist would claim that sexual intercourse, whether licit or illicit, has any effect on credibility. The pronouncement of judges long ago that when a woman lost her virtue her word could no longer be trusted was a presumption without any proof to support it. Yet that old rule was utilized by defense counsel, not really to question the victim's credibility, but primarily to besmirch her character in the hope that the jury would be unwilling to send the defendant to the penitentiary over such a woman. The result was that a rape victim was often subjected to a harrowing cross examination about her past sexual history, and any misconduct or impropriety was blown up as though it were the controlling fact in the case. This device has not only resulted in the acquittal of many rapists who were actually guilty, *but the fear of it has caused many rape victims to refuse to prosecute because they were unwilling to be subjected to this disgraceful ordeal.*

This, I submit is a deplorable situation. What is needed is a clearly drawn statute prohibiting all such evidence which is not related to the crime charged. Section 2 subsection (2) of the Women's Commission proposal clearly does this.

This proposed statute would likewise exclude the victim's past sexual history on the issue of consent. The same considerations apply to the consent issue as apply to the credibility issue. Relationships between the victim and

> other persons on other occasions obviously have no logical or scientific bearing on whether or not the victim consented to the assault charged against the defendant. To make such evidence admissible would simply be to invite the defense to besmirch the character of the victim and to put her on trial instead of the defendant. However, prior sexual relationships between the victim and the defendant might well have a bearing on the consent issue, and this is provided for as an exception in the proposed statute.

Thus, the purpose of the rape shield statute is to guard against parading a victim's private sexual history before the public when such evidence has been deemed historically irrelevant as this could chill victims from coming forward to prosecute. The rape shield statute is also designed to prevent prejudice arising from promiscuity and by suggesting a "logical nexus between chastity and veracity." *State v. Sheets*, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005) (quoting *State v. Peterson*, 35 Wn. App. 481, 485, 667 P.2d 645 (1983)). "Additionally, the statute is designed to encourage rape victims to prosecute and also to eliminate prejudicial evidence which has little, if any, relevance." *Sheets*, 128 Wn. App. at 155 (citing *State v. Cosden*, 18 Wn. App. 213, 218, 568 P.2d 802 (1977)).

Public access to a rape shield hearing undermines the purpose of the statute. "[A] rape victim who is examined about the details of her personal sexual background may be less likely to be forthcoming if forced to discuss the matter in open court." *State v. Macbale*, 353 Or. 789, 814, 305 P.3d 107 (2013).

Hicklin cites to *Com v. Jones* where the Supreme Judicial Court of Massachusetts held that the public trial right attached to rape shield hearings which were required to be closed under Massachusetts' rape shield statute. *Com. v. Jones*, 472 Mass. 707, 724, 37 N.E.3d 589 (2015).

Com v. Jones is of very limited guidance because the *Jones* Court did not use the experience and logic test from *Press–Enterprise Co. v. Superior Court* to come to its conclusion. 478 U.S. at 8–10. Rather, the *Jones* Court declared that "[n]either the United States Supreme Court nor this court has articulated a clear test for determining the threshold question whether a given proceeding constitutes part of the "trial" for purposes of the public trial right. *Jones*, 472 Mass. at 723.

The *Jones* Court concluded that "[a] rape shield hearing is neither a routine administrative matter nor is it "trivial" to the trial." *Jones*, 472 Mass. at 724; *see also* Br. of Appellant at 22. This is very similar to the legal-factual test which inquires whether a proceeding is legal and ministerial or adversarial and factual. *See State v. Smith*, 181 Wn.2d 508, 514, 334 P.3d 1049 (2014) (citing *Sublett*, 176 Wn.2d at 72).

Under that framework, rejected in Washington State in *Sublett*, the public trial right may be held to not attach to a particular proceeding if it is purely legal and ministerial. The test tends to be more mechanical in nature and seems to give easier guidance from a more bright line rule. The problem is that it also tends favor the form of labels over substance veering away from focusing on the core values underlying the right to a public trial. *See Sublett*, Wn.2d at 72 ("We decline to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other. The resolution of legal issues is quite often accomplished during an

adversarial proceeding, and disputed facts are sometimes resolved by stipulation following informal conferencing between counsel.").

Thus, the *Sublett* Court by adopting the experience and logic test from *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), did so recognizing that resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding. *Sublett*, 176 Wn.2d at 72–73. Further, by adopting the test, the Court opened up the inquiry to help focus on whether the core values of the public trial right are implicated. *Id.* at 73.

In contrast, the *Jones* Court analyzed the case with more reliance on the label of the proceeding and claimed that the rape shield hearing was similar to a "suppression hearing" which was held in *Waller* to implicate public trial rights. *Jones*, 472 Mass. at 724 (referring to *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)).

This ignores the unrelated concerns articulated in *Waller* in comparison to rape shield hearings.

Rape shield hearings to filter out irrelevant, inadmissible, and prejudicial evidence of a victim's past sexual history are simply not suppression hearings which are designed to protect 4th Amendment rights against unreasonable governmental intrusion. *See State v. McNeil*, 99 N.C.App. 235, 242, 393 S.E.2d 123 (1990) (Distinguishing *Waller* and suppression hearings from rape shield hearings).

The Court in *Waller* pointed out that in regards to suppression hearings, "[t]he need for an open proceeding may be particularly strong . . . . A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor." *Waller v. Georgia*, 467 U.S. 39, 47, 104 S.Ct. 2210, 2216, 81 L.Ed.2d 31 (1984). Thus, along with the core values underlying the right to a public trial, "[t]he public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." *Waller*, 467 U.S. at 47. Thus

public participation in suppression hearings has a positive impact in line with the purposes of the public trial right.

In stark contrast, the positive aspects of allowing public participation in suppression hearings do not carry over to rape shield hearings. The rape shield statute was created *because* of the long and negative experience from the antiquated common law which callously injected a victim's past sexual history into the public forum. *Jones*, 168 Wn.2d at 723 (quoting *Hudlow*, 99 Wn.2d at 8).

Public participation in such a setting is reminiscent of the days when victims were cross-examined at a public trial regarding their complete sexual history when such history was usually irrelevant to proving the charged crime and victims were reluctant to come forward to testify if at all. *See Duncan v. State*, 263 Ark. 242, 244, 565 S.W.2d 1 (1978); *Harris v. State*, 322 Ark. 167, 174, 907 S.W.2d 729 (1995) (citing *Gaines v. State*, 313 Ark. 561, 567, 855 S.W.2d 956 (1993) ("We have held that our Rape Shield Statute is intended to protect victims of rape or

sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt."); *State v. Sheard*, 315 Ark. 710, 716, 870 S.W.2d 212, 215–16 (1994) ("It is also intended to encourage rape and sexual assault victims to prosecute their attackers.").

Moreover, there are no concerns of exposing police misconduct in a rape shield hearing. *See State v. Macbale*, 305 P.3d 107, 122, 353 Or. 789 (2013) (stating that "unlike at a suppression hearing, public attendance at [a rape shield] hearing is not necessary to expose public corruption or police misconduct.").

Thus public participation in rape shield hearings would cut against the core values underlying the right to a public trial such a ensuring a fair trial and encouraging witnesses to come forward and discouraging perjury. *Sublett*, 176 Wn.2d at 72; *see also State v. Patnaud*e, 140 Vt. 361, 372, 438 A.2d 402 (1981) ("Perjury became rife in the defense of a rape case.")

("Vermont's sexual assault act . . . is modeled after the Michigan criminal sexual conduct act" "The rape victim shield provision of the act represents an explicit legislative decision to eliminate trial practices under our former rape law that had effectively frustrated society's vital interest in the prosecution of sex crimes.").

For the foregoing reasons, public participation in a rape shield hearing would not have a positive effect on the purposes of the process. Therefore, Hicklin fails to satisfy the logic prong of the test.

Conclusion

Rape shield hearings under RCW 9A.44.020(3)(c) have never been open to public participation because they were created for the very purpose of shielding a victim's irrelevant sexual history from public scrutiny which had a corrupt effect on the trial process. Similarly, legislatures throughout the United States have enacted rape shield laws requiring closed or in camera hearings because public participation has historically had

a negative impact on the fairness of the trial and has discouraged victims from coming forward to testify thereby thwarting efforts to seek justice through lawful prosecution.

Thus, public participation in rape shield hearings would have a negative impact upon the core values underlying the right to a public trial—to ensure fairness in the trial process, encourage witnesses to come forward, and to discourage perjury.

Therefore, under the experience and logic test, the public trial right does not attach to rape shield hearings.

Hicklin fails to meet his burden to establish that the rape shield hearing satisfies both prongs of the experience and logic test. *Sublett*, 176 Wn.2d at 73, 75. In fact, Hicklin declined to even address whether the public trial right attaches under the test. *See* Br. of Appellant at 17. Instead, under the label of "pretrial hearing," Hicklin relies on a single case from Massachusetts in which the proper test was *also* not employed and where the rape shield hearing was relegated to the same category as a suppression hearing intended to protect a defendant's 4th

Amended Rights from unreasonable governmental intrusion. Hicklin has not met his burden.

For the foregoing reasons, this Court should affirm.

B. DOUBLE JEOPARDY DOES NOT APPLY TO HICKLIN'S CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE BY STRANGULATION AND HARRASMENT–THREAT TO KILL BECAUSE THEY ARE NOT THE SAME IN LAW OR FACT.

Courts review whether multiple punishments constitute double jeopardy de novo. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007) (citing *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006)). "[T]o prevail in a double jeopardy challenge, a defendant must not only show the existence of two 'punishments' " but "must also affirmatively establish he or she has been punished twice for the same offense." *State v. Clark*, 124 Wn.2d 90, 101, 875 P.2d 613 (1994), *overruled on other grounds by State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997); *see also State v. Ridgley*, 70 Wn.2d 555, 557, 424 P.2d 632 (1967).

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution prohibit multiple punishments for the same offense. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). More than one punishment for a criminal act that violates more than one criminal statute, however, does not necessarily constitute multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *State v. Nysta*, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012) (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)). When the legislative intent is not clear courts apply the *Blockburger* test. *Freeman*, 153 Wn.2d at 776.

Under the *Blockburger* test, "if the crimes, as charged and proved, are the same *in law and in fact*, they may not be punished separately absent clear legislative intent to the contrary."

Freeman, 153 Wn.2d at 77 (citing *Blockburger*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)) (emphasis added). "If each offense requires proof of an element not required in the other, where proof of one does not necessarily prove the other, the offenses are not the same and multiple convictions are permitted." *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). Courts consider "the elements of the crimes as charged and proved, not merely as the level of an abstract articulation of the elements." *Freeman*, 153 Wn.2d at 757 (citing *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)).

"'[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether *each* provision *requires* proof of a fact which the other does not.'" *Freeman*, 153 Wn.2d at 772 (2005) (quoting *Orange*, 152 Wn.2d at 817) (emphasis added).

For example, in the case of *In re Orange*, a case where one single act formed the basis for charges of Attempted First Degree Murder and First Degree Assault, the Court found that the two crimes were based on the same shot (a single act) directed at the same victim "and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault." *In re Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004); *see also State v. Nysta*, 168 Wn. App. 30, 47–48, 275 P.3d 1162 (2012) (discussing *In re Orange*).

The bottom line is that the question to be asked is whether the evidence *required* to support the conviction for *either* [one crime] *or* [the other] would have been sufficient to warrant a conviction upon the other. *Nysta*, 68 Wn. App. at 47 (citing *Orange*, 152 Wn.2d at 820) (emphasis added).

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Rape by Forcible Compulsion and Assault by Strangulation

The jury was instruction on Rape in the Second Degree as follows:

> To convict the defendant of the crime of rape in the second degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (l) That on or about July 4, 2020, the defendant engaged in sexual intercourse with Kathleen Hawthorne;
>
> (2) That the sexual intercourse occurred by forcible compulsion; and
>
> (3) That this act occurred in the State of Washington.

CP 65.

Forcible compulsion is defined as follows:

> Forcible compulsion means physical force that overcomes resistance, *or* a threat, express or implied, that places a person in fear of death or physical injury to himself or herself or another person, or in fear of being kidnapped or that another person will be kidnapped.

CP 67.

The jury instruction for Assault in the Second Degree by strangulation requires the State to prove as follows:

> To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (l) That on or about July 4, 2A20, the defendant intentionally assaulted Kathleen Hawthorne by strangulation; and
>
> (2) That this act occçurred in the State of Washington.

CP 69.

"'Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability breath, or doing so with the intent to obstruct the person's blood flow or ability to breathe." CP 71.

Here, the crimes of Second Degree Rape by forcible compulsion and Second Degree Assault by strangulation, as charged and proven, are not the same in law or in fact.

Rape in the Second Degree includes the element of sexual intercourse but not the element of strangulation. Second Degree Assault in this case required proof of the element of strangulation and not the element of sexual intercourse. *See State v. Lee*, 12 Wn. App.2d 378, 399 n.11, 460 P.3d 701 (2020). Therefore, each

crime requires proof of an element not required in the other and so they are not the same in law. *See State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005).

Additionally, the two crimes are not the same in fact. Each provision requires proof of a fact that the other does not. Evidence proving strangulation is not sufficient to prove the crime of Second Degree Rape by forcible compulsion. Evidence of intercourse is still required. Also, evidence of Rape in the Second Degree by forcible compulsion was not sufficient to prove Assault in the Second Degree by strangulation. The jury was not required to find that strangulation used to accomplish sexual intercourse in order to convict.

It was enough in this case for a jury to find that Hicklin used *any* physical force or a threat to overcome resistance.

Here, the evidence showed Hicklin was much larger than Hawthorne who was only 92 lbs. She was in a position on the couch with Hicklin over her where she was stuck as Hicklin held her down. Hawthorne testified that everything happened very

fast. She tried to resist a little bit in a way to show Hicklin it was not okay but that Hicklin was a very big man and that fighting back was futile. RP 302–03. Hawthorne testified that she tried to resist a little bit in a way to show Hicklin it was not okay. RP 302–03.

Hawthorne testified that fighting back was futile "[b]ecause he's a very big man and the position, it was the position alone was enough and it just there was no way." RP 303. This was enough physical force to overcome Hawthorne's resistance constituting forcible compulsion.

Thus, evidence *required* to prove forcible compulsion to accomplish sexual intercourse and Second Degree Rape is not sufficient to prove strangulation. Therefore, Second Degree Rape and Second Degree Assault in this case are not the same in law or fact and convictions and punishment for both do not violate double jeopardy.

Hicklin argues that the prosecution admitted that it relied upon strangulation to prove forcible compulsion. Br. of

Appellant at 30. This mischaracterizes the proper in inquiries because proof of strangulation does not prove Rape in the Second Degree because proof of sexual intercourse is still required. Additionally, the evidence *required* to prove forcible compulsion does not prove strangulation.

Additionally, it is not enough that both crimes stemmed from the same ongoing transaction to conclude, as suggested by Hicklin, that they are the same in law and fact. Br. of Appellant at 30. Rather, "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *In re Orange*, Wn.2d at 817.

Hicklin cites to *State v. Ticeson*, 26 Wn. App. 876, 880–81, 614 P.2d 245 (1980) for the proposition that two crimes are the same in law and fact if they are part of the same transaction. This is an incorrect reading of *Ticeson*. The *Ticeson* Court found

that indecent liberties and assault in the second degree were the same in law and fact because the evidence required to prove indecently liberties was sufficient to prove assault in the second degree. *Ticeson*, 26 Wn. App. at 880 ("The acts of force *necessary* to commit the crime of indecent liberties upon Sandra M. were the same as the acts of force inflicted upon her as alleged in the count charging assault in the second degree." (emphasis added)).

Hicklin also cites to *State v. Johnson*, 92 Wn.2d 671, 672–73, 600 P.2d 1249 (1979). *Johnson* is inapplicable. Johnson focused in particular on pyramiding of charges in relation to kidnapping charges. *Id.* at 676. The *Johnson* Court noted that "[a] number of courts perceived that such employment of kidnaping statutes was not within the legislative intent." *Id.* The *Johnson* Court decided the matter by a finding legislative intent based on the reading of the relevant statutes rather than on the *Blockburger* Test used when legislative intent is vague. *Id.* ("*As we read the statutes*, the legislature intended . . . .").

This case is far closer to the facts in *State v. Lee*, 12 Wn. App.2d 378, 399, 460 P.3d 701 (2020). In that case, Lee, charged with two counts of second degree assault, second degree rape, and felony harassment, also strangled his victim while raping her digitally after he could not maintain an erection long enough. *Id.* at 384–85. Lee argued that his convictions for rape and assault *may* be the same in fact "because assault by strangulation could have been viewed by the jury as proof of the forcible compulsion required to convict him of rape." *Id.* at 712.

The *Lee* Court held that Lee failed to meet his burden to prove double jeopardy because there were other acts that could satisfy the forcible compulsion requirement. *Id.* "In addition to strangling K.H., Lee verbally threatened her such that she was in fear for her life and used his forearm to pin her down by her collarbone while he forcibly removed her clothing. Any of these actions could have independently established forcible compulsion."

Here, as in *Lee*, pinning Hawthorne down and overcoming her resistance with an overwhelming difference in size and verbal threats could have independently established forcible compulsion.

Therefore, Hicklin fails to establish that Rape in the Second Degree by forcible compulsion and Assault in the Second Degree by strangulation are the same in law and fact.

Second Degree Rape and Harassment–Threats to Kill

> To convict the defendant of the crime of harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (l) That on or about July 4, 2A20, the defendant knowingly threatened to kill Kathleen Hawthorne immediately or in the future;
> (2) That the words or conduct of the defendant placed Kathleen Hawthorne in reasonable fear that the threat would be carried out;
> (3) That the defendant acted without lawful authority; and
> (4) That this threat was made or received in the State of Washington.

CP 74.

The crimes of Second Degree Rape and Felony Harassment each have elements not included in the other. Rape

requires sexual intercourse, felony harassment requires a threat to kill. They are not the same in law. *State v. Nysta*, 168 Wn. App. 30, 48, 275 P.3d 1162 (2012).

Additionally, they are not the same in fact. Evidence required to prove Second Degree Rape by forcible compulsion is not by itself sufficient to prove Harassment–Threat to Kill. As pointed out above, all that was necessary to prove forcible compulsion was "physical force that overcomes resistance." Under the facts of this case, as in *Nysta*, "second degree rape did not require proof of a threat to kill." *Nysta*, 168 Wn. App. at 49.

Therefore, second degree rape and harassment–threat to kill are not the same in fact.

Second Degree Rape and Unlawful Imprisonment

> To convict the defendant of the crime of unlawful imprisonment, each of the following five elements of the crime must be proved beyond a reasonable doubt:
> (l) That on or about July 4, 2020, the defendant knowingly restrained the movements of Kathleen Hawthorne in a manner that substantially interfered with her liberty;
> (2)That such restraint was without Kathleen Hawthorne's consent;

> (3) That the defendant knew that such restraint was without Kathleen Hawthorne's consent;
> (4) That such restraint was without legal authority; and
> (5) That any of these acts occurred in the State of Washington.

CP 78.

Here, the evidence necessary to prove forcible compulsion was sufficient to prove unlawful imprisonment.

The State concedes that unlawful imprisonment and Rape in the Second Degree by forcible compulsion are the same in fact in this case and the Unlawful Imprisonment conviction should be vacated.

C. THE CONVICTIONS FOR SECOND DEGREE ASSAULT AND HARRRASMENT–THREATS TO KILL DO NOT MERGE WITH SECOND DEGREE RAPE UNDER THE FACTS OF THIS CASE.

"'The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code.'" *State v. Atkins*, 130 Wn. App. 395, 398–99 123 P.3d 126 (2005) (quoting *State v. Parmelee*, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001)). "'It is a rule of

statutory construction by which the court determines whether the legislature intends to punish a constituent crime . . . .'" *Id.* (quoting *State v. Vladovic*, 99 Wn.2d 413, 419–21, 662 P.2d 853 (1983)) (emphasis added). "It is a question of law, and review is de novo." *Id.* (citing *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005)). But, as with any canon of statutory construction, we need go no further than the statutes, if the language is clear. *Id.* (citing *State v. Sweet*, 138 Wn.2d 466, 477–78, 980 P.2d 1223 (1999).

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
> (a) By forcible compulsion;

RCW 9A.44.050.

Here, the statutory construction of RCW 9A.44.050 (second degree rape), RCW 9A.36.021 (second degree assault), and RCW 9A.46.020 (felony harassment) show that neither strangulation nor harassment are elements of Second Degree Rape. Further, evidence of strangulation or harassment are not

required nor do they necessarily prove forcible compulsion. Thus, the State was not required to prove strangulation or harassment in order to prove Second Degree Rape. *See State v. Eaton*, 82 Wn. App. 723, 731, 919 P.2d 116 (1996) *overruled on other grounds by State v. Frohs*, 83 Wn. App. 803, 811 n.2, 924 P.2d 384 (1996) ("It only applies where the State must prove both an underlying crime and an accompanying crime to prove a particular degree of crime.").

"Finally, even if on an abstract level two convictions appear to be for the same offense or for charges that would merge, if there is an independent purpose or effect to each, they may be punished as separate offenses." *Freeman*, 153 Wn.2d 773 (citing *State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996)).

Here, the testimony shows that Hicklin began to get angry and started yelling and then first began to overwhelm Hawthorne with his hand on her neck and his weight on her body because Hawthorne did not have his bank card. He demanded to know,

pinned her to the couch, threatened to kill her, and began choking her because of the missing bank card. Then he raped her. The rape and other behaviors had different purposes.

Therefore, the crimes of Assault in the Second Degree by strangulation and Harassment–Threat to Kill do not merge with Rape in the Second Degree and each of those convictions should be affirmed.

D. THE STATE CONCEDES THAT THE COMMUNITY CUSTODY CONDITION TO STAY OUT OF DRUG AREAS AND REQUIREMENT TO PAY THE SUPERVISION FEE SHOULD BE STRICKEN.

The community custody condition prohibiting Hicklin from going to drug areas as defined by the court or community corrections officer is vague and allows for arbitrary enforcement.

The trial court intended to impose only mandatory legal financial obligations. The supervision fee is a discretionary fee written in boiler plate that was most likely overlooked. *See State v. Ramirez,* 191 Wn.2d 732, 426 P.3d 714 (2018) and *State v. Dillon,* 12 Wn. App. 2d 133, 456 P.3d 1199 (2020) (where

defendant is indigent and record demonstrates court's intent to waive nonmandatory financial obligations, boilerplate financial obligations should be stricken).

IV. CONCLUSION

Rape shield hearings under 9A.44.020(3)(c) do not implicate public trial rights under the experience and logic test because they have never been subject to public access and the statute was enacted precisely because of the harms created by public access to a victim’s largely irrelevant past sexual history.

The crimes of Second Degree Assault by strangulation and Harassment-Threat to Kill are not the same in law and fact as Second Degree Rape by forcible compulsion. Therefore, Hicklin fails to meet his burden to establish double jeopardy.

Finally, those crimes do not merge because RCW 9A.36.021, Assault in the Second Degree, does not require the State to prove either Second Degree Assault by strangulation and Harassment-Threat to Kill.

For all the foregoing reasons, this Court should affirm the convictions for Second Degree Rape by forcible compulsion, Second Degree Assault by strangulation, and Harassment-Threat to Kill. Further, the Court should remand the case to vacate the conviction for Unlawful Imprisonment and strike the community custody condition prohibiting Hicklin from entering drug areas and strike the community supervision fee.

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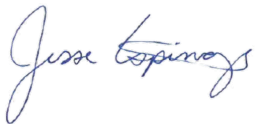
Respectfully submitted this 25th day of July, 2022.

MARK B. NICHOLS
Prosecuting Attorney



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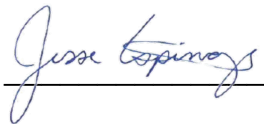

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